JD(SF)-79-04
Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

CHARLES SCHWAB & CO., INC.

and **Case 28-CA-19445**

MARCELA JOHNSON, an Individual

Chris J. Doyle, Esq., Phoenix, AZ, for
the General Counsel.
Dawn C. Valdivia, Esq., Phoenix, AZ, for
the Charging Party.
Christopher M. Mason, Esq., Phoenix, AZ,
and *Zachary A. Hummel, Esq.,* St. Louis, MO,
for the Respondent.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, on September 1-3, and October 20, 21, and 26, 2004. Marcela Johnson, an individual (the Charging Party or Johnson), filed an unfair labor practice charge in this case on May 3, 2004.[1] Based on that charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint on June 30, 2004. The complaint alleges that Charles Schwab & Co., Inc. (the Respondent or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[2] I now make the following findings of fact and conclusions of law.

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[1] The Respondent's amended answer admits the filing and service of the charge, as alleged in the complaint. (Res. Exh. 16.) All pleadings reflect the complaint and answer as those documents were finally amended at the hearing.

[2] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

Findings of Fact

I. Jurisdiction

The complaint alleges, the answer admits, and I find that the Respondent is a California corporation, with an office and place of business in Phoenix, Arizona (herein called the Respondent's facility), where it has been engaged in the business of operating a brokerage for the trading of securities. Further, I find that during the 12-month period ending May 3, 2004, the Respondent, in the course and conduct of its business operations, derived revenues in excess of $500,000 from the sale of securities; and that during the same period, the Respondent sold and shipped from its facility located within the State of Arizona products, goods, and materials valued in excess of $5,000 directly to points located outside the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. The Dispute

It is the General Counsel's contention that the Respondent discharged its employee Marcela Johnson because she engaged in protected concerted activity. Allegedly, that activity included complaining to the Employer about working conditions, specifically sexual harassment by employee Ed Steinert directed toward her and other employees. The alleged protected concerted activity also included Johnson's conversations with other employees about these matters, and her efforts to garner support from fellow employees.

Further, the General Counsel contends that during the Respondent's investigation of Johnson's claims of sexual harassment, its senior manager of human resources, Tammy Kornegay-Hodges (Hodges), prohibited employees from discussing among themselves the substance of these claims. According to the General Counsel, such a prohibition constitutes an overly broad and discriminatory rule against discussing matters relating to terms and conditions of employment. It is also alleged that during the course of the investigation, Hodges unlawfully interrogated employees about their concerted activities and the concerted activities of other employees, specifically about whether they had discussed the substance of Johnson's claims.

The complaint alleges that the Respondent's actions in terminating Johnson, prohibiting employees from discussing the matters related to Johnson's claims of sexual harassment, and the interrogation of employees about whether they had discussed such matters, constitutes a violation of Section 8(a)(1) of the Act.

The Respondent denies the commission of any unfair labor practices. According to counsel for the Respondent, Johnson was fired because she made a false claim of sexual harassment by fellow employee Ed Steinert. Counsel argues that during the course of the Respondent's necessary investigation of Johnson's claims, Hodges determined that Steinert was innocent of any wrong doing, and that Johnson's claims were purely fictional. Johnson allegedly disliked Steinert, for reason unrelated to sexual harassment. Secondarily, Johnson was allegedly fired because of her reoccurring unprofessional behavior directed toward other employees.

It is the Respondent's position that an employee's claim of sexual harassment is extremely serious, cannot be ignored, and that under Title 7,[3] the Respondent has an affirmative responsibility to conduct a remedial investigation of such a claim. The Respondent does not deny that during the course of its investigation employees were asked to keep the matters under discussion confidential. However, counsel contends that there is substantial justification for such a request, as sensitive matters, such as alleged sexual harassment, cannot be candidly investigated without employees being assured that any information they give will be held in confidence. Counsel for the Respondent argues that the General Counsel's theory of the case presents the Respondent with a "Hobson's Choice," as not restricting employee discussions about a claim of sexual harassment will allegedly result in a tainted and incomplete investigation.

In any event, the Respondent contends that none of its actions involving Johnson's claims of sexual harassment, or the ensuing investigation of those claims, violated the Act. It is the Respondent's position that Johnson was terminated for good cause, unrelated to any protected concerted activity in which she may have engaged.

B. The Facts

While the parties disagree as to certain matters, for the most part, the chronology of the events in this case is not disputed. The Respondent first employed Marcela Johnson in August of 1999 in its "Build a Broker Program." That was a program designed to train individuals who did not have previous brokerage experience to become securities brokers. Unfortunately, Johnson was not successful in passing the required exams necessary to advance in the program. However, she was able to obtain employment within another of the Respondent's departments. In February of 2000 she secured employment as an operations specialist in the "Schwab One" department, which subsequently changed its name to that of the Business Service Company (BSC). The BSC is the department that services customer checking and credit card accounts. This remained Johnson's permanent assignment until her termination on November 5, 2003.[4]

During the time of most of the events in question, Johnson was supervised by Cheri Melle, who was a senior manager in the BSC. The immediate events that led to Johnson's termination began on October 15, when Jeff Hansen, the director of the Electronic Order Review department, complained to Melle about Johnson's conduct. Melle testified that Hansen told her that earlier that day he had been making an award presentation to an employee in his department, when Johnson "spoke loudly" and directed certain of his department employees "to be quiet." Johnson's desk and cubicle were close to where the award presentation was being conducted, and she complained that the noise was too loud and was disturbing customer calls. Apparently, Hansen was upset with the manner in which Johnson had told his department employees "to be quiet." In any event, Melle promised Hansen that she would talk with Johnson about the matter.

Shortly thereafter, Melle called Johnson into a vacant office where they discussed Hansen's complaint. Following Johnson's explanation of what had occurred, Melle indicated that Johnson should not have raised her voice in her effort to get the employees to be quiet. There was also some discussion about tension between two teams of employees. Melle testified that toward the end of their meeting, Johnson said that there was an issue of "sexual

[3] Title 7 of the 1964 Civil Rights Act.

[4] All dates are in 2003 unless otherwise indicated.

harassment" that she had not previously reported, but that had occurred. She was reluctant to give any details, but Melle pressed her, saying that any instance of sexual harassment had to be reported to management. According to Melle, in response Johnson said that fellow employee Ed Steinert had "rubbed up against" her, and it made her feel very uncomfortable. Melle subsequently prepared a "note" to Johnson's file memorializing the substance of their conversation. (Res. Exh. 37.)

Johnson remembers the conversation with Melle somewhat differently. She testified that after talking about tension between the teams of employees, she told Melle that there was only one employee with whom she had some tension, and that was Ed Steinert. Johnson said that it might be an "H R issue," but that she had taken care of the problem by no longer speaking to Steinert. Although pressed by Melle for details, Johnson allegedly declined to talk further about the matter.

This disparity between Melle and Johnson is the first of many instances where there are variances between the testimony of Johnson and virtually every other employee who testified at the trial, both supervisors and rank and file employees. Johnson testified for an extended period of time over several days under direct and cross-examination, and I had ample opportunity to observe her demeanor and to consider the plausibility of her testimony. I did not find Johnson to be a credible witness. When testifying over matters critical to her case, I found her testimony to be confused and inconsistent. Specific examples will be given later in this decision. Further, I found her memory to be selective. She exaggerated and embellished those incidents that placed her conduct in the best possible light, and conveniently forgot those incidents that did not reflect favorably upon her. She was plainly uncooperative when answering questions on cross-examination, and I found her testimony in general to be disingenuous. On certain critical matters, her testimony was inherently implausible. Further, were I to credit Johnson, I would be forced to discredit virtually all the other witnesses, not only supervisors, but rank and file employees as well, even including friends of Johnson. This I am obviously not willing to do. Accordingly, where there are variances between Johnson's testimony and that of other witness, I credit the others.

Tammy Kornegay-Hodges (Hodges) is a senior manager of human resources for the Respondent. She testified at length over several days. I found her to be an intelligent, articulate, and thoughtful witness. Her testimony was reasonable, inherently plausible, consistent, and supported by the weight of the evidence, including both corroborating witness testimony and documentary evidence. She answered questions in a forthright manner, had excellent recall of events, and was cooperative on both direct and cross-examination. Her testimony certainly had "the ring of authenticity" to it, and I found her to be a very credible witness.

By e-mail dated October 17, Melle alerted Hodges to the issues that Johnson had raised with her several days earlier. The e-mail mentions that Johnson spoke of an "HR" issue with Ed Steinert, and Johnson's reluctance to pursue the matter. However, after some "probing" by Melle, Johnson explained that Steinert had "rubbed up against her." In the e-mail, Melle suggested that Johnson had "a pattern" of raising unrelated matters during counseling sessions "in an effort to bring the attention away from her an onto others." (C.P. Exh. 1.) At the time, Hodges was out of town, however, when she returned she met with Melle on October 30 to discuss the matter. They decided to meet with Johnson in order to obtain more details about the allegation concerning Steinert. Immediately thereafter, Hodges sent Johnson an electronic request for a meeting.

Before the meeting with Johnson could take place, Jeff Bosio, a team manager in the Electronic Order Review department, came by to speak with Hodges. Bosio told Hodges that one of his employees, John Creelman, was very upset with Johnson. Allegedly, Johnson had approached Creelman while he was on a smoke break and asked him if he recalled seeing Ed Steinert massaging employee Barbara Cauzabon, and if he remembered commenting that the sight was "disgusting." Creelman reported to Bosio that Johnson had said that she was alleging sexual harassment against Steinert. Creelman felt that Johnson was attempting to use him to support her claim, and that he was "being set up." Creelman apparently wanted no part in the matter and had come to Bosio to complain.

By this time a meeting with Johnson had been scheduled, however, Melle informed Hodges that Johnson was "a wreck," that she did not want to meet, and had asked to have the meeting cancelled. Hodges immediately went to Johnson and attempted to put her mind at ease, explaining that while they had to discuss the Steinert matter further, not to worry about it. In any event, later that same day a meeting was held in Hodges' office with her, Melle, and Johnson present. Hodges began the meeting by asking Johnson to expand on the matters she had previously discussed with Melle. Johnson asked if they could just "forget the whole thing." She said that she was under an incredible amount of stress, had a sick family member, and was in "no frame of mind" to have this discussion. Hodges indicated to Johnson that the Employer was required to ensure that she had a safe place to work, and it had an obligation to investigate her claims. Johnson responded by saying that she did not want to get anybody fired. Hodges reassured her that they were not talking about getting anyone fired, and that all the Human Resources department wanted to do was to find out specifically what had transpired.

According to Hodges, Johnson finally responded by saying that Ed Steinert had rubbed up against her, and had whispered in her ear, "You look very sexy today." Hodges asked Johnson to demonstrate on Melle exactly what Steinert had done. With Melle sitting in a chair, Johnson came up behind her, put her arms on the top of Melle's shoulders, and "did a bit of a massaging motion." At the same time, Johnson leaned into her ear closely, and in a "heavy, whispery voice" said, "You look very sexy today." Hodges testified that Johnson said this conduct by Steinert had occurred only once. While Johnson could not easily place the date of the incident, after being pressed, she estimated it occurred from one year to six months earlier.

Hodges asked Johnson whether she was aware of any other inappropriate, or harassing conduct by Steinert. Johnson mentioned that she and John Creelman had witnessed Steinert massaging Barbara Cauzabon, and that Creelman had characterized the conduct as "disgusting." Johnson also said that Steinert had made the statement to employee Vanessa Baragon that, "You look good enough to eat." Hodges testified that Johnson had indicated that because of Steinert's unwelcome contact and comment that she had stopped talking with him. Further, Johnson mentioned that she was annoyed with Steinert for playing his music too loudly, and for talking when she was on the phone with customers. She mentioned Teresa McClung as another employee upset with Steinert for his alleged loud and insensitive actions.

During the course of their conversation, Hodges asked Johnson whether she had spoken to John Creelman about the Steinert matter. Johnson indicated that she had not, and Hodges did not mention that Bosio had told her otherwise. Hodges informed Johnson that she was going to investigate the allegations against Steinert. She admits asking Johnson to "keep the matter confidential," at which point the meeting ended.

Melle supports Hodges' version of the meeting with Johnson in all material respects. Melle did add that during the meeting, Johnson mentioned that Teresa McClung had overheard Steinert tell Vanessa Baragon that she looked good enough to eat. In general, I found Cheri

Melle to be credible. She testified twice, once as a witness for the General Counsel, under rule 611(c) of the Federal Rules of Evidence, and once as a witness on behalf of the Respondent. At the time she was called to testify by the Respondent, Melle was no longer employed by Schwab, retiring on September 8. Having ceased her employment with the Respondent, there was no longer any incentive to testify favorably for her previous employer, which further enforces my impression that she testified credibly.

In many respects, Johnson's testimony about her meeting with Hodges and Melle conforms to the testimony given by the two supervisors. However, where it is at variance with the supervisors, I credit Hodges and Melle. As I indicated earlier, I found Johnson to be an incredible witness. As an example of the incredible nature of her testimony, I will point out the numerous inconsistencies in her testimony regarding the number of times Steinert allegedly made physical contact with her. Initially, when questioned by counsel for the General Counsel, Johnson testified that following the first unwelcome advance, Steinert made contact with her "several times… it would be like every other day that he would do those." On those occasions he would again allegedly whisper in her ear and say, "You look very sexy today." A little later in her testimony she told the General Counsel that these unwelcome advances occurred "over a month" period. Still later she told the General Counsel that during her meeting with Hodges and Melle that she informed them the unwanted contact occurred "several times."[5] However, Johnson was not finished changing her story, and on cross-examination she testified that Steinert "at least three or four times" came up behind her, rubbed her shoulders, and whispered in her ear that she looked very sexy, or words to that effect. Johnson continued to expand the number of these incidents, when still on cross-examination she testified that on approximately 15 occasions Steinert put his hands on her shoulder and whispered into her ear that she looked sexy today. It is hard to imagine that a witness could be as confused and inconsistent about a matter that was allegedly so significant to her. Frankly, this inconsistency is so stunning as be alone a sufficient basis for finding the Charging Party to be incredible.

On October 31, Hodges met with Steinert. According to Hodges, he characterized his relationship with Johnson as "workplace friends." They had previously discussed various matters at work including Johnson's divorce, her significant weight loss, and raising children. At his invitation she and her children had once attended a performance at his church. However, he said that more recently Johnson was not speaking with him, and he indicated that he did not know why. In response to a direct question from Hodges, Steinert said that he had never engaged Johnson in a manner that could be considered inappropriate. Regarding rubbing or massaging Johnson, Steinert could not recall having done so. He was certain, however, that he had never engaged in any activity with Johnson that was not consensual, or that she had asked him to stop. Further, he was adamant that he had never used the term sexy with Johnson.

Hodges also asked Steinert whether he had ever made the comment to Vanessa Baragon that she looked good enough to eat. According to Hodges, he responded, "Absolutely not…. That's not how I behave at work." However, he did not deny massaging Barbara Cauzabon. Steinert explained that he and Cauzabon had worked together for seven years and were friends. Cauzabon allegedly had a back problem, and she would on occasion ask him to

[5] Both Melle and Hodges credibly testified that Johnson said the unwelcome touching by Steinert had only occurred once. Also, the documentary evidence fully supports the supervisors' testimony. (C.P. Exh. 3, Res. Exh. 37, & G.C. Exh. 3.)

massage her back. It was not done in secret, but right on the team floor. Hodges testified that she reprimanded Steinert for giving massages, telling him that it must cease, and that Schwab "was not a massage parlor." She explained to Steinert that giving massages at work was "unprofessional," and that she "was not going to warn him about that again."

For the most part, Steinert's testimony corroborated Hodges. His testimony was credible, if somewhat defensive. In my view, this would certainly not be unusual for someone being accused of sexual harassment at the workplace. He denied any sexual harassment, denied massaging Johnson or saying that she looked sexy, and denied that he ever told Vanessa Baragon that she looked good enough to eat. Steinert did acknowledge massaging Barbara Cauzabon, with her consent, for which he received a verbal reprimand from Hodges.

Next, Hodges interviewed John Creelman. He immediately told Hodges that he did not want to be involved, but ultimately he agreed to answer her questions. According to Hodges, Creelman said that he had been on a smoke break when approached by Johnson. Johnson questioned him about whether he recalled seeing Ed Steinert massage Barbara Cauzabon, and whether he recalled saying that it was disgusting. Allegedly, Johnson informed Creelman that she was going to report Steinert for rubbing up against her and for saying that she looked good enough to eat.[6] Hodges testified that Creelman indicated that he told Johnson that he didn't believe that Steinert was harassing her, and that she was going to get herself in trouble. Creelman told Hodges that he had made the comment about it being disgusting that Steinert was massaging Cauzabon, but that he now felt he was "being set up" by Johnson.

Creelman was employed as a senior trading analyst. His testimony corroborated Hodges. He did add regarding the "disgusting" comment, that when asked by Johnson if he remembered making the comment, he had told Johnson that he had meant the comment as a "joke." Creelman's testimony seemed credible, and there was no incentive for him not to be so.

At this point in her investigation, Hodges felt she had enough information to further question Johnson. In this second interview, which occurred on November 4, Hodges again asked Johnson whether she had discussed her claim against Ed Steinert with John Creelman. According to Hodges, Johnson initially denied doing so, but finally admitted that she had spoken with Creelman. However, contrary to Creelman's testimony, she indicated to Hodges that it was Creelman who had initiated the conversation, asking her what was wrong. Hodges testified that she asked Johnson about her conversation with Creelman, because she was beginning to have doubts about Johnson's veracity, and wanted to further inquire regarding the inconsistencies that appeared to exist in Johnson's story. Hodges also further inquired about Johnson's contention that Steinert had told Vanessa Baragon that she looked good enough to eat. Johnson continued to make the assertion, adding that employee Teresa McClung had also overheard the comment.[7]

Immediately after having the follow-up interview with Johnson, Hodges called Teresa McClung into an office for an interview. There is apparently no dispute that at the time, Johnson and McClung were good workplace friends. Further, there is no dispute that McClung did not like Steinert. She told Hodges that she was not talking to Steinert, because he was "inappropriate." By inappropriate she meant that "he plays his music too loud…. talks to

[6] As was noted earlier, Johnson made the claim to Hodges that Steinert had told Vanessa Baragon that Baragon "looked good enough to eat."

[7] During her testimony, Johnson acknowledged telling Hodges that Teresa McClung had overheard Steinert's comment to Baragon that she "looked good enough to eat."

[McClung and others] while they're on the phone with clients," and eavesdrops on conversations. However, in response to a question from Hodges, McClung indicated that she had never seen Steinert engage in a manner that could be construed as sexual harassment. According to Hodges, McClung specifically denied that she had ever seen Steinert massage or rub up against Johnson, knew of no such incident, and had never heard Steinert make the comment to Vanessa Baragon that she looked good enough to eat.

Teresa McClung's testimony corroborated Hodges. She added that Johnson had never said anything to her about Steinert sexually harassing her, nor had she observed any such thing. She had never heard Steinert say anything of a sexual nature to either Johnson or Baragon, and had never seen Steinert massage Johnson. However, she had discussed with Johnson certain of Steinert's irritating habits, such as playing his music too loudly and eavesdropping. I give McClung's testimony significant weight. She did not like Steinert and was a friend of Johnson, and yet she directly contradicted Johnson's contentions regarding Steinert. I am unaware of any ulterior motive that could have resulted in false testimony.

The next person that Hodges interviewed was Vanessa Baragon. Baragon characterized Steinert as a "great guy," and indicated that they had a good relationship. According to Hodges, Baragon was adamant that Steinert had never said to her that she looked good enough to eat, or words to that effect.

Hodges testified that with her investigation completed, she decided to bring her findings to the attention of the appropriate management officials. Thereafter, she met with Cheri Melle, Lisa Gee, the BSC director, and Victoria Wallace, the manager of the Human Resources department. Hodges informed them of her findings, and her conclusion that while there might have been a "sliver of accuracy" to Johnson's claims, it was primarily a "deliberate attempt to misrepresent" on the part of Johnson. The managers concluded that the only part of Johnson's story that seemed to be accurate was the claim that Steinert had massaged Barbara Cauzabon. Everything else seemed to be entirely fabricated.

According to Hodges, the managers also discussed Johnson's total work performance. The consensus was that while her "technical contribution" was acceptable, there had been a problem with her ability to get along with fellow employees. Melle testified at length about an ongoing problem that Johnson had in her relationships with fellow employees. She specified a number of employees with whom Johnson allegedly had difficulty working, including several employees who requested that their seat assignments be changed so that they might be placed at some distance from Johnson.[8]

Johnson did not specifically deny these allegations about her inability to get along with fellow employees. However, in any event, I do not believe that it would be productive to spend time discussing each of these claims by Melle, as it is clear to me that the Employer's principal stated reason for discharging Johnson was her alleged fabrication of a claim of sexual harassment against Ed Steinert. It is the Respondent's position that Johnson "misrepresented events, provided inconsistent statements, and provided false accounts regarding witnesses of specific statements and/or events." Further, she had attempted to involve other employees in her disingenuous claims against Steinert. (G.C. Exh. 3.)

[8] Former BSC employee Lesa Monaham Folker testified about problems that she had on the job with Johnson, and about her complaints to management about Johnson. Folker seemed credible, had her own difficulties with management, and as a former employee certainly was not induced to testify favorably toward the Respondent.

According to Hodges, she recommended that Johnson be terminated. Managers Gee, Melle, and Wallace all supported that recommendation. As the senior manager for the BSC, Melle was the person who actually made the decision to fire Johnson.

On November 5, Johnson was informed that she was being terminated. Hodges told her that the investigation of her claim of sexual harassment by Steinert had been concluded, and the evidence failed to support her contentions. In fact, the investigation revealed that Johnson had made inconsistent and dishonest statements about what other employees had actually witnessed or observed, and about what conduct had occurred, and what statements had actually been made. Johnson was informed that the Employer considered this dishonesty and misconduct, for which she was being terminated. While these were the reasons given orally to Johnson, the managers prepared an internal written document entitled "Recommendation for Company Initiated Termination," which specifically set forth the reasons for termination. (G.C. Exh. 3.) As I have mentioned, the document indicated that the principal reason for the termination was Johnson's fabrication of the sexual harassment claim. Secondary reasons included her difficulty getting along with fellow employees, as well as an attempt to involve other employees in her false claims.

One matter that must be discussed is the testimony of Brad Allen. At the time he testified, Allen was a former Schwab employee. He had originally been hired for the "Build a Broker Program." However, he did not pass the necessary exams, and was apparently released by the Respondent. He was rehired in May 2000 to the Schwab One department where he remained until he quit, approximately eight months prior to the hearing. Allen and Johnson were "dating" at the time of the hearing, and had been for a significant period of time. During the hearing, I sustained a number of objections from counsel for the General Counsel and counsel for the Charging Party to inquires from counsel for the Respondent regarding the detailed nature of that relationship. However, from their testimony, it is obvious that Allen and Johnson had a long-term personal and intimate relationship. As such, there is no doubt that Allen was not an unbiased witness. For that reason, as well as because of certain inconsistencies in his and Johnson's testimony, which I will mention, I do not credit his testimony.

Johnson testified that Brad Allen observed Steinert putting his hands on her shoulders and whispering into her ear. She also testified that even though they were dating at the time, this did not make Allen mad. Further, she alleges that Allen advised her to report the harassment to management. Johnson did not do so, allegedly because she was of the opinion that Cheri Melle would take no action and nothing would happen. While Johnson testified that Allen knew that she was not talking to Steinert because of his sexual harassment of her, the documentary evidence shows otherwise. In a number of e-mail messages between Allen and Johnson, Allen specifically asks why Johnson is not talking to Steinert. Nowhere in those e-mails is there any reference to sexual harassment by Steinert. (Res. Exh. 4 & 5.) In an e-mail from Allen to Johnson dated August 25, regarding Steinert, Allen directly asks, "What exactly is it that he has done to you to make you not like him, ignore him and totally ignore him?" However, none of Johnson's reply e-mails mentions unwanted touching, whispering in her ear, or sexual harassment as the reason for her silent treatment to Steinert.

Allen testified that he twice observed Steinert massaging Johnson, and once observed Steinert talking into Johnson's ear. According to Allen, on two occasions Johnson spoke to him about Steinert touching her, and how uncomfortable she felt. She also reported to him that Steinert told her she looked "sexy." Allegedly, the second time that she spoke with him about the matter, Allen advised her to report the incidents to management, because he felt that "she may have been a victim." Of course, as I have noted, this testimony by Allen makes no sense in

light of the e-mail messages between Allen and Johnson, in which he expresses ignorance of why she is upset with Steinert. Even more incredible was Allen's testimony that he wasn't angry with Steinert, or jealous, despite his feeling that Steinert's actions were "inappropriate" and that Johnson may have been a "victim."

When considered as a whole, Allen's testimony is simply incongruous. He claims to have been aware of the sexual harassment. However, in several e-mail exchanges with Steinert, he denies any knowledge of why Johnson is upset, and encourages Steinert to approach Johnson directly to find out why she has a problem with him. (Res. Exh. 14 & 15.) Further, when pressed on cross-examination, Allen testified that he thought Johnson was ignoring Steinert because Steinert "was getting into Ms. Johnson's business and another co-worker's business." If Allen and Johnson had really discussed Steinert's massaging and inappropriate comments of a sexual nature, why did Allen testify that he thought Johnson was ignoring Steinert for a totally different reason? Why didn't Allen confront Steinert with the allegation that Steinert was sexually harassing Johnson, a woman with whom Allen was personally involved? Allen's testimony makes no sense. The only logical conclusion that can be reached is that Allen and Johnson never discussed incidents of sexual harassment by Steinert. In my opinion, Allen has likely fabricated such alleged conversations in an effort to support Johnson's claims.

According to Allen, he encouraged Johnson to "patch things up" with Steinert. This comment is simply incompatible with an allegation of sexual harassment. The fact that Allen was never offered as a witness by Johnson to support her claims of sexual harassment during the Respondent's investigation of the matter is very telling. Allen admits that he never came forward to inform Tammy Kornegay-Hodges that he had observed the alleged sexual harassment. How could this be, if in fact he had information that might save his good friend's job? Even after Johnson was fired, Allen did not come forward, and incredibly claims that he did not really know why she was fired. This makes no sense, and is certainly not credible.

As I have noted, Johnson's testimony is filled with inconsistencies and contradictions. Her testimony regarding Allen's knowledge of the events in question is in direct contradiction to the written record. She testified that Allen knew that she was not talking with Steinert because of the sexual harassment. However, not only did Allen deny being so aware, but the e-mails between the two also disprove her contention. Also, Johnson's testimony that she was unaware that Steinert had approached Allen in an effort to find out why she was not talking to him is totally contradicted by the same e-mails. (Res. Exh. 3-5.)

Counsel for the General Counsel called Johnson back to testify as a rebuttal witness. In an effort to explain why she had not named Allen as a supporting witness during the Respondent's investigation of her claims, Johnson testified that Hodges had "never asked." Of all the incredible statements made by Johnson during her testimony, this may have been the most incredible. During the investigation by Hodges, Johnson had not hesitated to mention Barbara Caubazon, John Creelman, and Vanessa Baragon as employees who had allegedly witnessed Steinert's inappropriate actions of a sexual nature. However, she testified that she did not mention the name of her close friend Allen, because Hodges did not specifically ask about him. This is patently ridiculous. It is clear to me that had Allen truly witnessed any unwanted touching or comments of a sexual nature by Steinert, Johnson would have surely offered his name to Hodges.

The incredible nature of Johnson's testimony, the credible testimony of other witnesses, as well as the totality of the evidence, leads me to the conclusion that she has largely fabricated the allegations of sexual harassment by Steinert. I share Cheri Melle's contention that in an

effort to divert attention from herself during a counseling session, Johnson alleged improper conduct by Steinert. It may well be that she never intended for the claim to proceed to a formal investigation by the Human Resources department. Her initial reluctance in meting with Hodges and furnishing details would tend to support that conclusion. She soon found herself in the position of having to furnish details to a claim of sexual harassment, or to accept the consequence of having made an unfounded complaint. Johnson then offered embellishments regarding other alleged improper conduct by Steinert. However, her contentions were largely unsupported by the employees who she named as having corroborating evidence.

On the other hand, there is ample evidence that Johnson did not like Steinert. She considered him loud, intrusive, and nosy. Her unhappiness with him resulted in her decision to ignore him, and not to talk to him. This was a course of action that she had periodically followed with other employees whose conduct she disapproved. In any event, during a counseling session with Melle, Johnson attempted to divert attention from herself to Steinert. The credible evidence establishes that she was willing to make a false claim of sexual harassment against him, and she then found it necessary to support that claim by offering details, which were for the most part untrue. Hodges' investigation disclosed that Johnson had fabricated, embellished, and exaggerated her claims against Steinert, and had attempted to involve fellow employees in support of her false claims. The investigation was followed by Johnson's termination. However, it must still be determined whether the Respondent's decision to fire Johnson was based on her protected concerted activity, or whether it was for good cause, unrelated to any protected conduct under Section 7 of the Act in which she may have engaged.

C. Analysis and Conclusions

1. Concerted Activity and Marcela Johnson's Termination

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…." Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). An employer violates Section 8(a)(1) of the Act when it discharges an employee for engaging in protected concerted activity. *Rinke Pontiac Co.*, 216 NLRB 239, 241, 242 (1975).

The Board, with court approval, has construed the term "concerted activities" to include "those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries, Inc.*, 281 NLRB 882 (1986), affirmed, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988); see *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964) (observing that "a conversation may constitute a concerted activity although it involves only a speaker and a listener" if "it was engaged in with the object of initiating or inducing or preparing for group action or…it had some relation to group action in the interest of the employees"). See also *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing as an example "the lone employee" who "intends to induce group activity").

In deciding "when the act of a single employee is or is not 'concerted,'" the Board has held that the "object of inducing group action need not be express," but "may be inferred from the circumstances." *Whittaker Corp.*, 289 NLRB 933, 933-934 (1988); see *Ajax Paving Industries, Inc. v. NLRB*, 713 F.2d 1214, 1218 (6th Cir. 1983) (*per curiam*) (Board reasonably

inferred that employee's conduct "reflected commonality of purpose"); *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 412*, 328 NLRB 1079, 1081 (1999) (object of inducing group action need not be express).

In the case before me, the threshold issue that must be addressed is whether Johnson's actions constituted protected concerted activity. In her counseling session with Melle, she notified management of a problem she was allegedly having with Steinhert. A meeting was then scheduled for Johnson to furnish details of her claim to the Human Resources department. However, before the meeting began, she approached fellow employee Creelman in an effort to determine whether he recalled an incident where Steinert was allegedly massaging another female employee. Johnson informed Creelman that she had a meeting with human resources scheduled to discuss Steinert's alleged harassment of her. Creelman clearly wanted no part of Johnson's complaint. He told her that his previous comment characterizing Steinert's massaging of Barbara Cauzabon as "disgusting" had been a "joke." Creelman warned Johnson to tell the truth to human resources and be careful what she said, because "someone's going to get hurt." He testified that he "didn't want to be involved in the conversation any longer." As soon as Johnson left, Creelman went to his supervisor and reported what Johnson had said. Creelman told his supervisor that he "wanted to stay out of the whole thing," and felt he was "being set up" by Johnson.

At the meeting with Tammy Kornegay-Hodges, Johnson reluctantly furnished the names of fellow employees Barbara Cauzabon, Vanessa Baragon, John Creelman, and Teresa McClung as having information about inappropriate conduct allegedly engaged in by Steinert. Johnson furnished this information only after being pressed by Hodges to support her claim with any other examples of harassment by Steinert of which she was aware. Johnson made it clear to Hodges that she was not interested in pursuing a claim against Steinert, and was doing so only because Hodges insisted on further details. Hodges informed Johnson that the Employer had a responsibility to its employees to ensure a safe, harassment free work place, and having learned of Johnson's complaint against Steinert, the Employer had no choice but to pursue the matter. Subsequently, Hodges interviewed the other employees named by Johnson.[9]

Counsel for the General Counsel and counsel for the Charging Party argue that Johnson was engaged in concerted activity when she spoke to Creelman, and by giving Hodges the names of other employees who were aware of Steinert's alleged inappropriate conduct. While in the broadest sense this may be considered "concerted activity," because Johnson was involving other employees, it is clear to me that Johnson was offering these "witnesses" only in order to support her own claim. She injected fellow employees into her claim against Steinert, not in any effort to protect them, or other employees, but only because she was being pressed by Hodges to support her claim. Having raised the issue of alleged sexual harassment by Steinert, Johnson unhappily found herself in the position of having to furnish details to Hodges, or risk being accused of making a baseless claim. There is absolutely no indication that Johnson was in any way interested in ensuring that other employees be protected against sexual harassment at the workplace. She was interested only in protecting herself against a finding that she had made a merit less claim against Steinert. By contacting Creelman and by naming other employees, Johnson may have technically been engaged in concerted activity. However, I do not believe that such activity was for the purpose of "mutual aid or protection."

[9] Apparently, Hodges did not interview Barbara Cauzabon. However, as Steinert acknowledged giving her massages, and as she had not complained, Hodges may have assumed there was little reason to interview Cauzabon. In any event, Steinert was orally warned by Hodges to immediately cease giving massages at work.

The Board has recently considered this very issue. In *Holling Press Inc.*, 343 NLRB No. 45 (October 20, 2004), the Board found that an employee's complaint of sexual harassment, filed with a state agency, was individual in nature. The state agency requested that the charging party support her claim by providing additional information. In an effort to do so, she asked a fellow employee, who had also allegedly be subjected to sexual harassment by the same leadman, to be a witness in her sexual harassment proceeding at the state agency. In order to obtain her cooperation, the charging party had gone so far as to inform the fellow employee that she could be "hit" with a subpoena and required to testify. The employer was aware of the charging party's complaints, and had promised that, to the extent possible, she would not be required to work alone with the leadman. In any event, ultimately the charging party was fired. Her termination letter stated that she was fired for "attempt[ing] to coerce coworkers into corroborating an unsubstantiated charge of sexual harassment against one of [her] supervisors."

The Board emphasized that, "Where employees concertedly band together to seek from their employer an improvement in terms and conditions of employment, or protection against an adverse change in the same, they are engaged in Section 7 activity." However, in contrast, the Board found that the charging party "sought to pursue a personal claim before a state agency." The Board held that although it was concerted activity for the charging party to ask other employees to help her, "that conduct was not for mutual aid or protection." Her "purpose was to advance her own cause," not "to accomplish a collective goal." The Board decided that the charging party's complaint to the state agency was individual in nature and reflected her belief that she was the victim of sexual harassment. It found that she talked to co-workers about the leadman in response to the state agency's direction that she provide more information and identify potential witnesses. The Board found "no evidence that [the charging party] offered or intended to help any employees as a quid pro quo for their support of her personal claim" and "no evidence that any other employee had similar problems-real or perceived-with a coworker or supervisor." It was specifically noted by the Board that the co-worker whose aid was solicited by the charging party did not exhibit any interest in helping the charging party. The Board decided that these factors "clearly establish the absence of any mutual purpose here."

Sexual harassment, the Board emphasized, "can be, and often is, of concern to many persons in the workplace." Clearly, "Where the victims and their supporters protest that conduct, the protest can fall within the ambit of Section 7. However, where one employee is the alleged victim, that lone employee's protest is not concerted."

In my view, the case at hand is remarkably on point with the *Holling Press* case. The allegations of sexual harassment were of concern only to Johnson. No other employees were interested. John Creelman, the only employee approached by Johnson, was adamant in his intent to remain uninvolved in the dispute, going so far as to tell his supervisor that he felt that Johnson was trying to "set him up." The employees named by Johnson all uniformly either denied that Steinert was involved in any inappropriate conduct, had not complained about Steinert, or denied any knowledge of such conduct. In contacting Creelman and giving Hodges the names of certain employees, Johnson's purpose was clearly to advance her own cause. Her conduct was not for "mutual aid or protection." In the matter before me, there is no

evidence that Johnson offered or intended to help any employees as a *quid pro quo* for their support of her personal claim of alleged sexual harassment by Steinert. Further, there is no evidence that any other employee had similar problems-real or perceived-with Steinert.[10]

I am left with the clear impression that the record is devoid of any credible evidence to establish that Johnson's conduct was intended to benefit any other employee. As such, although it may technically have constituted concerted activity, it was not undertaken for mutual aid or protection. It follows, therefore, that Johnson was not engaged in protected concerted activity within the meaning of Section 7 of the Act. Accordingly, even assuming, for the sake of argument, that the Respondent terminated Johnson because she engaged in "concerted activity," as alleged in the complaint, the Respondent's action would not constitute a violation of Section 8(a)(1) of the Act.

However, for the sake of completeness, and in the event that either the Board, or a reviewing court, disagrees with my finding, I shall go on and analyze Johnson's termination under the assumption that her conduct did constitute protected concerted activity within the meaning of the Act. In *Wright Line, A Division of Wright Line, Inc*., 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp*., 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has not made a *prima facie* showing that Johnson's protected concerted activity was a motivating factor in the Respondent's decision to terminate her. The Board, in *Tracker Marine, L.L.C*., 337 NLRB 644 (2002), affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place, even in the absence of the protected conduct. See *Mano Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros. Co*., 303 NLRB 638, 649 (1991).

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[10] The fact that Tammy Kornegay-Hodges gave Steinert a verbal reprimand for massaging co-workers at the facility does not establish that any of the employees, with the exception of Johnson, objected to massages. Hodges was rightly concerned with employees engaging in non-work related activity while at the facility. However, from the credible evidence it does not appear that any employee, other than Johnson, who may have received a massage from Steinert, objected, or considered it sexual harassment.

Regarding the existence of activity protected by the Act, as noted above, I am assuming, for the purpose of this discussion, that Johnson engaged in such activity. This activity included complaining to management about Steinert's alleged sexual harassment, contacting Crellman to seek his support, and furnishing the names of co-workers who allegedly could support a claim that Steinert had engaged in inappropriate conduct. Obviously, the Respondent was aware that Johnson had engaged in this activity. Creelman informed Hodges that Johnson had approached him about his knowledge of Steinert's alleged inappropriate conduct. It is also undisputed that in the course of interviewing Johnson regarding her claim of sexual harassment by Steinert, she was requested and did furnish to Hodges the names of co-workers who allegedly had information about Steinert's inappropriate conduct. There is also no doubt that Johnson sustained an adverse employment action. The Respondent terminated her employment on November 5, 2003. (G.C. Exh. 3.)

Concerning the question of whether there exists a link or nexus between the exercise of Johnson's protected concerted activity and her termination, I am of the view that the General Counsel has failed to establish such a connection. Assuming for the sake of this discussion that Johnson's complaint to management about Steinert's alleged sexual harassment and her efforts to involve other employees in support of her claims constituted concerted activity, I do not believe that those actions were a "motivating factor" in the Respondent's decision to terminate her. It is essential to recall that it was Cheri Melle and Tammy Kornegay-Hodges who insisted that Johnson furnish specific details about her claim of sexual harassment, including the names of individuals who had information supporting Johnson's claim of inappropriate conduct by Steinert. Johnson was very reluctant to give any details, or to proceed with an investigation, repeatedly asking to have the matter dropped. It was her managers who insisted that the matter be pursued, as the Respondent had an obligation to ensure a harassment free workplace.

The General Counsel's theory of this case is simply inconsistent with the factual reality. Having prodded Johnson for specific details about her allegations, so that a full investigation could be conducted, it would be totally illogical for the Respondent's managers to turn around and punish her for furnishing that information. The managers were not displeased with her for making her complaint, nor for furnishing the names of employees who could allegedly support her claims. They were, however, very displeased with Johnson for making, what certainly appeared to be, largely untruthful claims of inappropriate conduct by Steinert.

There is little doubt that Hodges conducted a full investigation of Johnson's claims, including interviewing numerous witnesses. As detailed above, the results of that investigation did not support most of Johnson's contentions. To the contrary, it appeared that she had largely fabricated her claims about Steinert. There is simply no credible evidence that the Respondent harbored animosity toward Johnson or discharged her because she engaged in concerted activity. The act that precipitated her termination was not her complaint of sexual harassment, the contact with fellow employees, or the furnishing of employee names, which was at the request of management, but, rather, her attempt to fabricate a claim against a co-worker.

The General Counsel has failed to meet his evidentiary burden and make a *prima facie* showing that any protected concerted activity engaged in by Johnson was a motivating factor in the Respondent's decision to terminate her. However, even further assuming, for the sake of argument, that the General Counsel had established a *prima facie* case, the evidence is clear that the Respondent would still have discharged Johnson, even absent any protected activity.

The Respondent's internal document setting forth its reasons for discharging Johnson and prepared by Hodges on November 5, conforms to those reasons given by the Respondent's managers in their testimony at the hearing. (G.C. Exh. 3, the Recommendation for Company

Initiated Termination, or RCIT.) After hearing the testimony of Hodges and Melle and reviewing the documentary evidence, it is obvious to me that the primary reason for Johnson's termination was because it appeared to the Respondent's managers that she had largely fabricated her claim of sexual harassment by Steinert. In her effort to support that claim, she had, as the RCIT correctly points out, "misrepresented events, provided inconsistent statements, and provided false accounts regarding witness[es']" observations of various alleged events. The credible testimony of Creelman, Steinert, McClung, Melle, and Hodges, as well as the credibly reported information obtained from Vanessa Baragon, establishes that Johnson was engaged in a campaign to discredit Steinert. This campaign was largely fabricated.

In my view, the Respondent has correctly characterized Johnson's actions in largely fabricating her claims as "dishonesty." In an effort to disprove any contention that its termination constituted disparate treatment of Johnson, the Respondent offered numerous examples of other employees who have been discharged because they engaged in other acts of dishonesty. (Res. Exh. 18-22.) While none of these incidents are especially similar to the matter at hand, I do not believe that is particularly significant. In my opinion, Johnson's conduct was egregious. She was clearly engaged in an effort to discredit a fellow employee, who it appears was largely innocent of the accusations she made against him. Whether she intentionally set out to do so, or merely became entrapped in a "web of her own deceptions,"[11] the result was the same. In any event, her actions were sufficiently egregious to serve as a legitimate basis for the Respondent to discharge her, regardless of any concerted activity in which she may have been engaged.

The RCIT does mention other reasons for Johnson's discharge, including difficulty getting along with fellow employees. While it appears that periodically Johnson would feud with co-workers who had in some way displeased her, I do not believe that this pattern of behavior significantly entered into management's decision to terminate her. Johnson's problems with interpersonal skills had been known to management for some time. Still, she was a fairly productive employee, earning a number of awards over the course of her career with the Respondent. Apparently, the Respondent was willing to overlook her difficulties with other employees in return for her productivity. However, ultimately her fabrication of the claims of sexual harassment and inappropriate conduct by Steinert were so serious that no amount of production could excuse them.

There is also a reference in the RCIT to Johnson's "statements to other employees of her plans" to charge Steinert with sexual harassment, and her "attempt to gather support from another co-worker for her proposed complaint." However, I do not believe that this was intended to serve by itself and out of context as a basis for her termination. Obviously, the co-worker referenced is Creelman, and the "support" mentioned is Johnson's effort to have Creelman report Steinert's massaging of Barbara Cauzabon as sexual harassment. In any event, as noted above, Creelman wanted no part in Johnson's complaint. He did not view Steinert's massaging of Cauzabon as harassment, and he told his supervisor that he felt Johnson was trying to "set him up." Hodges viewed this effort by Johnson as being in furtherance of her campaign to fabricate a claim against Steinert. Creelman clearly gave Hodges that impression when she interviewed him. Therefore, when placed in the proper context, the reference in the RCIT was merely intended as further evidence of Johnson's

[11] "Oh, what a tangled web we weave, when first we practice to deceive." Sir Walter Scott, British Novelist and Poet (1771-1832).

conduct in fabricating a claim of sexual harassment against Steinert. This, I have concluded, served as the basis for Johnson's discharge, even in the absence of any concerted activity in which she may have engaged.

In summary, I find and conclude that counsel for the General Counsel has failed to establish a *prima facie* case that Johnson was engaged in concerted activity within the ambit of Section 7of the Act. However, even assuming that Johnson was engaged in protected concerted activity, the General Counsel has failed to show that such activity was a "motivating factor" in the Respondent's decision to terminate her. Further, I find that assuming the evidence is viewed as having established a *prima facie* case, the evidence still supports a finding that the Respondent would have terminated Johnson, even in the absence of any protected concerted activity in which she may have engaged. Accordingly, I shall recommend that complaint paragraph 4(a), (b), and (g), and, to the extent that they relate to it, paragraphs 5 and 6 be dismissed.

2. Request that Employees Not Discuss Sexual Harassment Complaint

It is alleged in paragraph 4(c) of the complaint that since about October 30, the Respondent, through Tammy Kornegay-Hodges, has maintained and enforced an overly broad and discriminatory rule prohibiting employees from discussing matters relating to terms and conditions of employment, including complaints about sexual harassment or a hostile sexual work environment. Further, it is alleged in complaint paragraph 4(d) that since about November 4, Hodges has promulgated and enforced this rule.

The evidence is undisputed that at the conclusion of the meeting between Hodges, Melle, and Johnson on October 30, where Johnson disclosed her claims of sexual harassment, Hodges requested that Johnson "keep the matter confidential." Hodges testified that when dealing with a claim of sexual harassment, "it's really in the best interest of the person who's alleging the harassment" to keep the matter confidential. She explained that confidentiality would prevent the accused harasser from prematurely learning of the claim, and, thereafter, perhaps, creating a hostile environment for the complaining party, or even influencing potential witness to alter their recollection of the events in question. Hodges testified that further, confidentiality helps to ensure the integrity of the investigation, and that employees "feel confident…to report harassment."

On October 31, Hodges met with Steinert to explain Johnson's claim, and to get his side of the story. As she did with Johnson, Hodges requested that Steinert not discuss these matters with anyone. This was certainly consistent with her contention that confidentiality was essential during the investigation to ensure that the accused harasser did not try and influence potential witnesses.

Hodges credibly testified that the Employer does not have a written policy that prohibits employees from discussing sexual harassment concerns with other employees. Further, she testified that she has never told any employee, including Johnson, that if they discuss claims of sexual harassment with other employees, they will face discipline. The General Counsel does not dispute this contention. Yet, it is alleged in the complaint that at the second of the meetings between Hodges and Johnson, the one held on November 4, that Hodges promulgated and

enforced "the rule."[12] In fact, all Hodges did was to question Johnson about whether she had spoken to John Creelman about Steinert. Hodges credibly explained that she so questioned Johnson, not to determine whether Johnson had violated her earlier request to keep the matter confidential, but, rather, to determine whether, as was beginning to appear obvious, Johnson was fabricating her story. That would include her earlier denial of having spoken with Creelman about this matter.

Hodges testified that on November 4 she also met with Vanessa Baragon to determine the accuracy of Johnson's claim that Steinert had told Baragon she "looked good enough to eat." Following Baragon's denial that Steinert had made any such statement to her, Hodges cautioned Baragon to keep the matter confidential, and not to discuss the issue with anyone. On that same date, Hodges interviewed Teresa McClung to determine whether, as reported by Johnson, McClung had overheard Steinert allegedly telling Vanessa Baragon that she "looked good enough to eat." After McClung denied ever hearing Steinert say any such thing or having ever discussed such a comment with Johnson, Hodges requested that McClung keep these matters confidential.

The issue before me is simply whether Hodges' oral statements to Johnson, Steinert, McClung, and Baragon requesting confidentiality concerning claims of sexual harassment by Steinert, and Hodges' follow-up questions to Johnson, were violative of Section 8(a)(1) of the Act. Under the circumstances of this case, I do not believe that to be so.

In *Caesar's Palace*, 336 NLRB 271 (2001), the Board reversed an administrative law judge and found that the employer's need to maintain the confidentiality of an on-going drug investigation was a "substantial business justification" that justified the intrusion on its employees' exercise of Section 7 rights. The Board emphasized that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. Further, the Board agreed that the employer's rule prohibiting discussion of the on-going drug investigation adversely affected employees' exercise of that right. However, the Board still found the employer's rule lawful, and concluded that it could be enforced. The Board concluded that the interest of the employees in discussing the drug investigation was outweighed by the employer's legitimate and substantial business justifications. In this case the employer sought to impose the confidentiality rule to ensure that witnesses were not put in danger, that evidence was not destroyed, and testimony was not fabricated. According to the Board, the employer met its burden of demonstrating a legitimate and substantial business justification for its conduct. The Board cited *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3rd Cir. 1976), and held that the employer's action in maintaining and enforcing the confidentiality rule, or by discharging employees for breaching said rule did not violate the Act.

The Board reached a different conclusion in *Phoenix Transit System*, 337 NLRB 510 (2002), finding in agreement with the administrative law judge that the employer violated the Act by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves. The Board held that the employer had failed to establish a legitimate and substantial justification of its rule. In this case, the events at issue occurred approximately one and a half years after the employer concluded its investigation of

[12] I am assuming that the General Counsel is making reference to Johnson in paragraph 4(d) of the complaint. Counsel for the General Counsel does not specify in his post-hearing brief against which employees Hodges allegedly promulgated and enforced the "rule." However, the only employee Hodges questioned on November 4 regarding talking about these matters with a co-worker (Creelman) was Johnson.

the alleged sexual harassment. The Board distinguished this remote time frame from the *Caesar's Palace* case where the enforcement of the confidentiality rule in question was more immediate, and was needed to prevent a cover-up, including to ensure that witnesses were not put in danger, evidence was not destroyed, and testimony was not fabricated.

In light of the *Phoenix Transit System* and *Caesar's Palace* cases, it seems clear to me that the Board is attempting to strike a balance between the employees' Section 7 right to discuss among themselves their terms and conditions of employment, and the right of an employer, under certain circumstances, to demand confidentiality. The burden is clearly with an employer to demonstrate that a legitimate and substantial justification exists for a rule that adversely impacts on employee Section 7 rights. It is now appropriate to turn this discussion to the case before me.

The Respondent contends that Hodges' request of interviewed employees that they keep the matter of Steinert's alleged sexual harassment confidential was based on a desire to protect Johnson and others against retaliation, to protect the integrity of the investigation, and to encourage witnesses and victims to come forward. In his post-hearing brief, counsel for the Respondent argues that the threat of a finding of a violation of the Act would put the Respondent, and other employers, to the "Hobson's Choice" of risking either violating the Act or Title 7.[13] Counsel cites the Supreme Court cases of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), which stand for the proposition that employers must take affirmative steps to prevent and promptly correct sexually hostile or harassing work environments, or face liability for failing to do so. Further, he cites cases for the proposition that a prompt investigation and a policy requiring confidentiality in claims of sexual harassment may in part protect an employer against liability for the sexual harassment of one employee against another. See *Thomas v. Bet Soundstage Restaurant*, 104 F. Supp. 2d 558, 565-566 (D. Md. 2000); *Barrett v. Applied Radiant Energy Corporation*, 240 F. 3d 262, 266 (4th Cir. 2001).

In any event, under the circumstances of this case, the Respondent is not faced with such a "Hobson's Choice," as I conclude that it has met its burden and established a legitimate and substantial justification for the request by Hodges for confidentially. The facts establish that the Respondent has no *per se* rule against employees discussing questions of sexual harassment. Rather, acting on the basis of the information given to her by Johnson, Hodges interviewed and orally requested that Johnson, Steinert, McClung, and Baragon refrain from discussing the matter with fellow employees. The entire matter was resolved within a week of Hodges' oral request, and the investigation was concluded. It seems to me that for that limited period of time, the request for confidentiality was entirely reasonable. It would certainly serve the useful purpose of protecting Johnson, Steinert, McClung, Baragon, and other employees

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[13] At the hearing counsel for the Respondent called Amy Lieberman to testify. Ms Lieberman is an attorney with significant experience as a mediator, arbitrator, and lecturer, in the area of workplace liability avoidance, including harassment and discrimination, and in conducting effective workplace investigations. (Res. Exh. 23.) Counsel for the Respondent requested that I find Ms. Lieberman to be an expert witness. Counsel for the General Counsel and counsel for the Charging Party objected. I reserved ruling on the Respondent's request. While I found Ms. Lieberman to be an articulate, experienced, and knowledgeable attorney, I do not believe that she possesses the type of "scientific, technical, or other specialized knowledge" as contemplated in Rule 702 of the Federal Rules of Evidence. Accordingly, I am hereby declining to find her to be an expert witness. Therefore, while I certainly found her testimony and opinion interesting, I have given it no weight in rendering my decision in this case.

against retaliation, protect the integrity of the investigation, and encourage witnesses to come forward. It is important to recall that as she began the investigation, Hodges was uncertain of whether Steinert might attempt to take some adverse action against his accuser, assuming he learned prematurely of Johnson's claims. However, as the investigation progressed, Hodges' concerns legitimately turned to protecting the integrity of the investigation from possible manipulation by Johnson. All the time, Hodges needed to be mindful of the necessity of getting the cooperation of other employees who had been named in the investigation.

Although Hodges' request to keep the matter confidential could have had a brief chilling effect on the right of employees to discuss the claim of sexual harassment, it was certainly limited in time and scope. Further, any such intrusion on its employees' exercise of Section 7 rights was outweighed by the Respondent's substantial business justification for seeking confidentiality. *Caesar's Palace, supra*. Therefore, Hodges' action in requesting confidentiality of employees during her investigation did not constitute a violation of Section 8(a)(1) of the Act. Accordingly, I shall recommend that complaint paragraphs 4(c), (d), and (h), and, to the extent related, paragraphs 5 and 6 be dismissed.

3. The Alleged Interrogation of Employees

On September 3, 2004, during the course of the hearing, counsel for the General Counsel moved to amend the complaint in this matter by adding two allegations of interrogation of employees by Tammy Kornegay-Hodges in violation of Section 8(a)(1) of the Act. (G.C. Exh. 7.) I granted the motion and permitted this amendment over the objection of counsel for the Respondent on the basis that it appeared the matters raised in the amendment were closely related to existing allegations, and arose from the same facts and legal theory. *Payless Drug Stores*, 313 NLRB 1220 (1994). Further, the Respondent was not prejudiced by the amendment as the additional allegations were fully litigated at the hearing, and counsel for the Respondent had ample opportunity to offer rebutting evidence, which he did. *Pincus Elevator & Electric Co*., 308 NLRB 684 (1992).

The two alleged incidents of interrogation as set forth in the amendment, complaint paragraphs 4(f)(1) and (2), occurred on October 28, and November 4, respectively. However, it now appears from his post-hearing brief that counsel for the General Counsel intended the first allegation of interrogation to reflect a date of October 30, not October 28. Counsel for the Respondent takes the position in his post-hearing brief that the allegation of unlawful interrogation occurring on October 30, 2003, is barred by Section 10(b) of the Act, as having occurred more than six months prior to the filing of the unfair labor practice charge in this case on May 3, 2004. Counsel for the General Counsel contends that the allegation is timely. I agree with counsel for the Respondent. Any alleged unfair labor practice committed by the Respondent on October 30, 2003, would be time barred by the six-month limitation set forth in the Act. As noted, the charge was filed on May 3, 2004, which was obviously more than six months after the commission of the alleged unfair labor practice occurred on October 30, 2003. Accordingly, the amended complaint allegation in paragraph 4(f)(1) is barred by Section 10(b) of

the Act.[14] However, as the two allegations of unlawful interrogation are factually closely connected, I will still discuss both incidents.

As I have discussed at length above, Hodges, Melle, and Johnson met on October 30 so that Hodges could hear in detail about Johnson's claim of sexual harassment by Steinert. Although reluctant at first, Johnson ultimately offered Hodges information concerning Steinert's alleged sexual harassment and inappropriate conduct toward not only herself, but also toward other female employees. Johnson mentioned John Creelman as someone who had witnessed Steinert's allegedly inappropriate conduct in massaging Barbara Cauzabon. Hodges specifically asked Johnson whether she had discussed this matter with Creelman, and Johnson denied doing so. However, Hodges had information to the contrary, having already been informed by Creelman's supervisor, Jeff Basio, that Creelman felt he was being "set up" by Johnson. In any event, as the meeting ended, Hodges requested that Johnson not discuss this matter with anyone.

In the course of her investigation of Johnson's claims, Hodges interviewed Creelman twice, the first of those two occasions on November 3. As I explained in detail earlier, Creelman informed Hodges how Johnson had approached him to discuss Steinert's conduct. Creelman also expressed his feeling that Johnson was setting him up in an effort to support her claim of sexual harassment by Steinert. His version of the Barbara Cauzabon incident differed significantly from that told to Hodges by Johnson. Also, what Johnson had allegedly told Creelman about her problem with Steinert was at variance with what Johnson had told Hodges.

On November 4, Hodges met with Johnson a second time, after having interviewed Creelman and Steinert. Hodges had some follow-up questions for Johnson. Hodges was concerned after talking with Creelman that Johnson might be fabricating her claim, and trying to influence the statements of other witnesses. Knowing from both Basio and Creelman that Johnson had approached Creelman, Hodges again asked Johnson whether she had been in contact with Creelman about the Steinert matter. Hodges credibly testified that Johnson initially continued to deny that she had spoken with Creelman about this issue. However, finally she did admit that she had a conversation with Creelman about Steinert, but she insisted that Creelman had initiated the conversation. There also continued to be significant other variances with the story that Creelman had told Hodges. By now Hodges was suspicious of the truthfulness of Johnson's claims, and she continued her investigation by interviewing Theresa McClung, Vanessa Baragon, and Creelman for a second time. Ultimately, Hodges came to the conclusion that Johnson had fabricated, exaggerated, and embellished most of her claims about Steinert, and had distorted or misrepresented the involvement of other employees. As set forth above, she recommended the termination of Johnson.

What remains before me is the General Counsel's contention that by questioning Johnson on October 30 and November 4 about whether she had spoken to Creelman, Hodges was engaged in the unlawful interrogation of Johnson concerning her protected concerted activity. I have already determined that in requesting confidentiality during the course of her

[14] The case cited by counsel for the General Counsel in his post-hearing brief, *Redd-I, Inc.,* 290 NLRB 1115 (1988), is inapposite for the position he takes. In that case the Board, citing NLRB v. *Dinion Coil Co*., 201 F. 2d 484, 491 (2nd Cir. 1952) held that, "If a charge was filed and served within six months after the violations alleged in the complaint, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (1) they are closely related to the violations named in the charge, and (2) occurred within six months before the filing of the charge." (Underscoring was added by the undersigned.)

investigation, Hodges was not in violation of the Act. I have found that the Respondent had a substantial business justification for requesting confidentiality that justified an intrusion on its employees' exercise of Section 7 rights. Where such a justification exists, the Board has determined that a respondent does not violate the Act by interrogating an employee about breaches of that confidentiality rule. *Caesar's Palace, supra*. Therefore, Hodges' interrogation of Johnson about her conversation with Creelman, even if intended to determine whether she breached Hodges' request for confidentiality, did not constitute a violation of the Act.

Even if approached from a more traditional viewpoint, I do not believe Hodges' questioning of Johnson about her conversation with Creelman constituted a violation of the Act. Traditionally, the Board looks to the "totality of the circumstances" in determining whether a supervisor's questions to an employee about her protected activity were coercive under the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. In *Medcare Associates, Inc*., 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "*Bourne* factors," so named because they were first set forth in *Bourne v. NLRB*, 332 F. 2d 47, 48 (2nd Cir. 1964). These factors include the background of the parties relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

In the matter before me, it is important to bear in mind that the investigation conducted by Hodges was initiated by Johnson's claim that Steinert had sexually harassed her. Johnson named Creelman as an alleged witness to Steinert's inappropriate conduct. Hodges was merely investigating those allegations, and the subsequent questions that arose as to whether Johnson was fabricating her claims. Under such circumstances, the questioning is unlikely to be found coercive. See *Phillips-Van Heusen Corp*., 165 NLRB 1,16 (1967). Further, I am of the view that the "totality of the circumstances" in this case makes it apparent that Hodges was merely doing what the law required of her, which was to take seriously, immediately investigate, and put a stop to any sexual harassment that may have been occurring. There was nothing coercive about Hodges' questions. Moreover, it seems to me that having initiated the claims of sexual harassment and inappropriate conduct, Johnson is hard pressed to now contend that Hodges' efforts to investigate those claims created a restraint upon her protected activity. This is even more obvious when one considers the significant probability that Johnson largely fabricated those claims.

Accordingly, based on the above, I shall recommend that amended complaint paragraphs 4(f)(1) and (2) and, to the extent related, paragraphs 5 and 6 be dismissed.

Conclusions of Law

1. The Respondent, Charles Schwab & Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The complaint is dismissed.

Dated at San Francisco, California, on December 16, 2004.

Gregory Z. Meyerson
Administrative Law Judge

[15] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.